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May 18, 2005

VIA PDF EMAIL ONLY

Galena West, Commission Legal Counsel
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814-2329

Re: Interested Persons Meeting, May 19, 2005: Affiliated Entities
and Aggregation (FPPC Regulation (18428 ("18428"))

Dear Ms. West:

I regret that an out-of-town family obligation prevents me from attending your Interested Persons Meeting tomorrow. I also apologize for the lateness in replying with these written comments. I provide an introduction and then address your five questions in the order in your email:

Introduction

(1) Long Standing Interest: As you will see if you read the Larry Woodlock's memo to the Commission on March 29, 2002 regarding 18428, I have wanted for some time for the Commission to consider clarifications to this Regulation. I understood and agreed at that time that the Commission's need was to not let the emergency regulation expire. It did that, and it also removed the contradictions in paragraph (d).

Now is an appropriate time to consider all the questions raised in your email and possibly more.

(2) What Does 18428 Say or Not Say Now?: To be able to make understandable recommendations on what changes might be considered in 18428, let me first summarize what I believe 18428 says and does not say and provide you an illustrative 461 and 460 Schedule A:

(a) Section (a): Requires aggregation of contributions by all affiliated contributors for limits and reporting purposes.

It first references 85311. This statute provides the (1) “direct and control” aggregation test by a single individual or a group of individuals and their related entities and (2) a presumption of aggregation based on majority ownership unless rebutted by acting “independently in their decisions to make contributions.”

Does the reference to Government Code section 85311 mean that its definitions apply to 18428? Therefore, does the term “entity” exclude an individual contributor?

(b) Section (b): Requires individual contributors (who contribute their own money) to file all such personal contributions and contributions of their affiliated entities on a single Form 461.

It next requires the consolidated 461 be filed in the name of the “person” who directs and controls these affiliated contributions, and presumably that “person” is an individual.

It is not clear to me how 18428 addresses two or more entities that are affiliated when a majority of the same group of individuals controls their contributions (as provided for in Government Code section 85311(c)), especially if none of these individuals make personal contributions. Does the person responsible for preparing and filing the consolidated Form 461 choose one of the entities to be the filer (“Name of Filer”) and consider the other entity contributors to be the “affiliated entities?”

This section then requires the 461 filer to disclose which of the affiliated entities makes “each itemized payment” on its Form 461. (See illustrated 461.)

And finally the 461 filer must “identify on its next campaign statement, the additions or deletions of any (affiliated) entity (contributor).” But it is unclear to me whether the current language could be read to imply that this obligation continues from one year to another? However, a contributor (or a consolidated contributor filer) loses Major Donor status on every December 31.

(c) Section (c): If the affiliated entities are recipient committees, each committee shall file its own Form 460.

(d) Section (d): There are five elements, as follows:

(i) Application only to 461 Filers?: Although it is not clear that the FPPC can require a transmittal letter be sent by a contributor who is not, or not yet, a Major Donor, this section appears to first confirm that it applies to any group of contributors that are "affiliated," even as they make their first two \$100 contributions from two separate but affiliated sources.

(ii) Required transmittal letter to recipient: It then says the contributor in an affiliation must advise the recipient (460 filer) in writing of (1) the name and address of the contributor, (2) the name(s) of all the affiliated entities, and (3) the requirement for the recipient 460 committee to identify the contributor "as an affiliated entity on (its 460 report)."

(iii) What "Affiliated Entities" to be on list attached to transmittal letter: It is unclear to me whether the list attached to the transmittal letter is those who did contribute to other committees during the same reporting period or those expected to contribute in that calendar year.

(iv) Proper Disclosure by Recipient: It then says that the 460 committee receiving such a contribution (and such a transmittal letter) must disclose the contributor as "[name of contributor] and affiliated entities" on its 460 report. (See illustrated 460.)

(v) 461 Filer not necessarily identified: What 18428 in my view does not says is that the 460 committee must identify the "Filer Name" contributor on its 460 report (consequently, there is no easy way for a citizen to find the consolidated 461 for the contributor upon viewing the 460 report.)

(e) Section (e): Requires the 460 committees to keep the transmittal letters from consolidated contributors for 5 years (to verify if the 460 and the 461s properly complied with section (d)?).

(f) Section (f): Exempts a sponsored committee from having to write a transmittal letter to itself and keep that transmittal letter for five years as required in sections (d) and (e) above.

(3) Illustrated 461 and 460 Schedule A: Attached, as discussed above, are illustrated pages from Form 461 and Form 460, Schedule A. The two-page 461 by "Smith Company and affiliated entities" illustrates the disclosure of three contributions that are also separately illustrated on the recipient's 460 Schedule A.

(a) 461 Report: The first contribution is made by Smith Company, the Form 461 "Name of Filer. The second contribution is made by Jones Company and is disclosed as I read 18428. The third contribution is also made by Jones Company and is disclosed as I read 18428, but see its disclosure on the 460, as I recommend below, which is different from the second contribution's.

(b) 460 Report: The first contribution from Smith Company has no additional parenthetical disclosure because it is the "name of filer contributor" of the 461. But if the FPPC wants the contributor name listed without "and affiliated entities" it could require the parenthetical below the contributor's name and address to state "(Affiliated entity contributor)," or some similar phrase.

The second contribution from Jones Company shows how I believe 18428 requires this disclosure; it does not let a citizen viewing the candidate's committee report (Form 460) find the affiliated contributor Form 461 filings, since this contributor is one of the affiliated entities but is not the entity contributor who is the "Name of Filer" on Form 461.

The third contributor is the same as the second contribution but disclosed as I recommend below.

With this introduction and these illustrated forms, I address your 5 questions:

Question 1: FPPC Should Add a Definition of "Affiliated Entities"?

As discussed in the March 29, 2002 memo, there are pros and cons to providing a "definition" in Regulation 18428; however, I believe the pros outweigh the cons because of the following four concerns:

(1) Affiliation is Not A Static Status: At present "affiliation" seems to be a continuing status among two or more contributors. The consolidated 461 filer needs to modify its list of affiliated entities by adding or deleting them, but without knowing if the list is for contributions made the filing period, in the calendar year, or otherwise. But

affiliation at the time of one contribution may not exist by the time a second contribution is made even from the same contributor and even during the same Major Donor reporting period. For example, Major Donor A decides to whom to contribute by vote of a committee of three. Therefore, under FPPC rules, A is not affiliated with any of those three individuals. However, if two of the individuals retire, and the Major Donor entity does not appoint successors, new contributions from A would be affiliated with the surviving decision maker if he or she makes personal contribution(s). In reverse order, Major Donor B's contributions are controlled by a single individual who also makes personal contributions early in a 461 reporting period; however, B then creates a contribution committee later in the same 461 reporting period and makes additional contributions. At that point the individual and B are no longer affiliated for those late contributions.

(2) Pre-Major Donor Status: A definition would also clarify whether 18428 applies to affiliated contributors who together are not, or not yet, a Major Donor and who might or might not be such by the next 461 closing deadline. This is mooted if you accept my recommendation on identifying the "Filer Name contributor" on the 460.

(3) Mergers and Spin-Offs: Nor does 18428 currently address contributions made by unaffiliated entities which then merge and become affiliated, or contributions by affiliated entities after one is sold, and they are no longer affiliated. The FPPC has discussed specific scenarios. (See FPPC Advice Letter to Kathryn Donovan (10/17/01) No. A-01-194.)

(4) Coverage: A definition would also let the FPPC clarify whether there are any different rules of affiliation for reporting purposes, for contribution limit purposes and for section 84308 purposes.

Question 2: Concerns With Sections (b) & (d)

(1) Contradiction Removed: Three years ago, I mentioned that the first and second sentences in 18428(d) appeared to me to be contradictory. This has been corrected.

(2) Providing 460 List of Affiliates is Unnecessary: Is it really necessary to have a consolidated 461 contributor provide every recipient the list of all its affiliates, including (a) those who have not contributed to that recipient, (b) those who have ceased contributing before this contribution but did in the filing period, or (c) those who have not

yet contributed in the same reporting period but may later in the year? Because each affiliate contribution will be identified by name of affiliate on the consolidated 461, I think it is not necessary.

(3) Have 460 Filer Identify 461 Filer: I recommend 18428(d) be modified to require an affiliated contributor to identify to the recipient (1) its full identification, (2) the identity of its Major Donor "Filer Name," if different from the contributor's name, and (3) the requirement of the recipient to also identify the Major Donor Filer Name on its 420 in the field where it discloses the contributor's contribution.

If this were to be done, the public would know the (1) identity of the actual contributor, and (2) how to find that contributor's 461 to learn of all the affiliated contributions disclosed thereon.

This requirement also eliminates the need to define whether affiliation is or is not a continuing status.

(4) More Appropriate Naming of 461 Filer: In sections (b) and (d), I believe there could be more appropriate naming of the consolidated Major Donor.

Whether the 18428(b) requirement for the 461 filer to be identified as ". . . the name of the person who directs and controls the expenditures . . ." applies when that individual does not make personal contributions should be clarified. But even if it only applies to persons who contribute and who "direct and control" entity contributions, if a company or union contributes thousands of dollars, and its president Mary Smith's only contribution is \$100 to her local school board candidate, do you want the Major Donor Filer Name to be: "Mary Smith and affiliated entities"?

Identification by the largest contributor, or any significant contributor and/or a publicly known contributor, seems to make more sense. Therefore, the regulation should allow a Filer Name choice to be "[appropriate entity name] and affiliated entities" or it could be, if you want, "[entity name], Mary Smith and affiliated entities," when Mary Smith is a personal contributor of some significance.

Question 3: Should Government Code Section 85311 Apply to Local
Candidates and Committees?

Proposition 34's language and intent should be researched and analyzed, and the Commission should decide whether this section applies to other than state contributions. Currently, the FPPC must have decided it covers only State contributions as its PRA publication says: "Affiliated Entities; Aggregation of Contributions to State Candidates."

If the Commission concludes it applies to locals, it should re-title this section and tell Deerings and West to do likewise; it would also be appropriate to confirm the application of this statute to local candidates in 18428.

Question 4: Application of 18428 to Government Code Section 84308

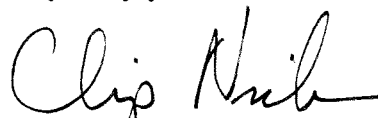
I recommend the Commission apply the candidate standards in section 85311 and 18428 be applied to 84308 because the trigger of the disqualification requirement is the receipt of campaign contributions. Also section 84308 is located in the Chapter 4 of the Act and not in Chapter 7.

Question 5: Aggregation and Sponsored Committees

Regulation 18419 should be amended to state that the 85311 and 18428 aggregation rules apply to sponsors and their committees if they become affiliated entities as defined by 85311 and 18428.

I hope your Interested Persons Meeting is productive and that you recommend appropriate amendments to this Regulation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Vigo Nielsen, Jr.", written in a cursive style.

Vigo G. Nielsen, Jr.

Major Donor and
Independent Expenditure
Campaign Statement
(Government Code sections 84200-84216.5)

MAJOR DONOR AND INDEPENDENT EXPENDITURE
COMMITTEE STATEMENT

Type or print in ink.

Date Stamp	CALIFORNIA FORM 461
Page _____ of _____	
For Official Use Only	

Statement covers period from 1/1/05 through 6/30/05	Date of election if applicable: (Month, Day, Year) N/A
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SEE INSTRUCTIONS ON REVERSE

1. Name and Address of Filer

NAME OF FILER (Include name(s) of all affiliated entities whose contributions are included in this statement.)	
Smith Company & Affiliated Entities	
RESIDENTIAL OR MAILING ADDRESS (NO. AND STREET)	
Address	
CITY	STATE ZIP CODE
Address	
RESPONSIBLE OFFICER (If filer is other than an individual)	AREA CODE/DAYTIME PHONE
Name	Phone

2. Nature and Interests of Filer (Complete each applicable section.)

<input type="checkbox"/> A FILER WHO IS AN INDIVIDUAL MUST LIST THE NAME, ADDRESS, AND BUSINESS INTERESTS OF EMPLOYER OR, IF SELF-EMPLOYED, THE NAME, ADDRESS, AND NATURE OF THE BUSINESS	BUSINESS INTERESTS
NAME OF EMPLOYER/BUSINESS	
ADDRESS OF EMPLOYER/BUSINESS	

☒ A FILER THAT IS A BUSINESS ENTITY MUST DESCRIBE THE BUSINESS ACTIVITY IN WHICH IT IS ENGAGED

Publisher

☐ A FILER THAT IS AN ASSOCIATION MUST PROVIDE A SPECIFIC DESCRIPTION OF ITS INTERESTS

☐ A FILER THAT IS NOT AN INDIVIDUAL, BUSINESS ENTITY, OR ASSOCIATION MUST DESCRIBE THE COMMON ECONOMIC INTEREST OF THE GROUP OR ENTITY

☐ Amendment (Explain):

3. Summary

(Amounts may be rounded to whole dollars.)

- Expenditures and contributions (including loans) of \$100 or more made this period. (Part 5.) \$ 20,000
- Unitemized expenditures and contributions (including loans) under \$100 made this period. \$ 0
- Total expenditures and contributions made this period. (Add Lines 1 + 2.) SUBTOTAL \$ 20,000
- Total expenditures and contributions made from prior statement. (Enter amount from Line 5 of last statement filed. If this is the first statement for the calendar year, enter zero.) \$ 0
- Total expenditures and contributions (including loans) made since January 1 of the current calendar year. (Add Lines 3 + 4.) TOTAL \$ 20,000

4. Verification

I have used all reasonable diligence in preparing this statement. I have reviewed the statement and to the best of my knowledge the information contained herein is true and complete. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____ By _____
DATE SIGNATURE OF INDIVIDUAL DONOR OR
RESPONSIBLE OFFICER IF OTHER THAN AN INDIVIDUAL

**Major Donor and
Independent Expenditure Committee
Campaign Statement**

Type or print in ink.
Amounts may be rounded
to whole dollars.

INDEPENDENT EXPENDITURE COMMITTEE AND
MAJOR DONOR COMMITTEE STATEMENT

Statement covers period

from 1/1/05

through 6/30/05

CALIFORNIA
FORM
461

Page of

SEE INSTRUCTIONS ON REVERSE

NAME OF FILER

Smith Company & Affiliated Entities

5. Contributions (Including Loans, Forgiveness of Loans, and Loan Guarantees) and Expenditures Made

(If more space is needed, use additional copies of this page for continuation sheets.)

DATE	NAME, STREET ADDRESS, CITY, STATE AND ZIP CODE OF PAYEE (IF COMMITTEE, ALSO ENTER I.D. NUMBER)	TYPE OF PAYMENT	DESCRIPTION OF PAYMENT (IF OTHER THAN MONETARY CONTRIBUTION OR LOAN)	CANDIDATE AND OFFICE, MEASURE AND JURISDICTION, OR COMMITTEE	AMOUNT THIS PERIOD	CUMULATIVE AMOUNT RELATED TO THIS CANDIDATE, MEASURE, OR COMMITTEE
5/16/05	Marine For Governor Address & ID (Affiliated Entity: Smith Company)	<input checked="" type="checkbox"/> Monetary Contribution <input type="checkbox"/> Loan <input type="checkbox"/> Non-Monetary Contribution <input type="checkbox"/> Independent Expenditure		Antonio Marine, Governor <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	5,000	5,000
5/17/05	Marine For Governor Address & ID (Affiliated Entity: Jones Company)	<input checked="" type="checkbox"/> Monetary Contribution <input type="checkbox"/> Loan <input type="checkbox"/> Non-Monetary Contribution <input type="checkbox"/> Independent Expenditure		Antonio Marine, Governor <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	5,000	5,000
5/18/05	Marine For Governor Address & ID (Affiliated Entity: Jones Company)	<input checked="" type="checkbox"/> Monetary Contribution <input type="checkbox"/> Loan <input type="checkbox"/> Non-Monetary Contribution <input type="checkbox"/> Independent Expenditure		Antonio Marine, Governor <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	10,000	10,000
		<input type="checkbox"/> Monetary Contribution <input type="checkbox"/> Loan <input type="checkbox"/> Non-Monetary Contribution <input type="checkbox"/> Independent Expenditure		<input type="checkbox"/> Support <input type="checkbox"/> Oppose		

SUBTOTAL \$

Schedule A (Continuation Sheet) Monetary Contributions Received

Type or print in ink.
Amounts may be rounded
to whole dollars.

SCHEDULE A (CONT.)

Statement covers period
from 1/1/05
through 6/30/05

CALIFORNIA
FORM 460

Page _____ of _____

I.D. NUMBER

NAME OF FILER

Marine For Governor

DATE RECEIVED	FULL NAME, STREET ADDRESS AND ZIP CODE OF CONTRIBUTOR (IF COMMITTEE, ALSO ENTER I.D. NUMBER)	CONTRIBUTOR CODE *	IF AN INDIVIDUAL, ENTER OCCUPATION AND EMPLOYER (IF SELF-EMPLOYED, ENTER NAME OF BUSINESS)	AMOUNT RECEIVED THIS PERIOD	CUMULATIVE TO DATE CALENDAR YEAR (JAN. 1 - DEC. 31)	PER ELECTION TO DATE (IF REQUIRED)
5/18/05	Smith Company & Affiliated Entity Address #1	<input type="checkbox"/> IND <input type="checkbox"/> COM <input checked="" type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC	N/A	5,000	5,000	5,000
5/20/05	Jones Company & Affiliated Entity Address #2	<input type="checkbox"/> IND <input type="checkbox"/> COM <input checked="" type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC	N/A	5,000	5,000	5,000
5/24/05	Jones Company & Affiliated Entity Address #2 (Affiliated Entity Filer: Smith Company)	<input type="checkbox"/> IND <input type="checkbox"/> COM <input type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC	N/A	10,000	5,000	5,000
		<input type="checkbox"/> IND <input type="checkbox"/> COM <input type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC				
		<input type="checkbox"/> IND <input type="checkbox"/> COM <input type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC				

SUBTOTAL \$

*Contributor Codes
IND - Individual
COM - Recipient Committee
(other than PTY or SCC)
OTH - Other (e.g., business entity)
PTY - Political Party
SCC - Small Contributor Committee